# In the Supreme Court of the United States

OCTOBER TERM, 1970

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No. 199

SAM FRANK URBANA, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on a two-count indictment charging him with causing two forged and falsely made traveler's checks to be transported in interstate commerce, in violation of 18 U.S.C. 2314. He was sentenced to concurrent terms of four years' imprisonment on each count.

Petitioner appealed his conviction (Case No. 26446), raising three points of error: (1) failure of the trial judge to instruct the jury on all elements of the offenses charged, (2) misconduct of the prosecutor, and (3) governmental electronic eavesdropping.

The court of appeals, in an opinion rendered June 26, 1969 (412 F. 2d 1081), found that the first two contentions did not require reversal, but vacated the judgment and remanded the cause for a hearing with respect to the eavesdropping issue, pursuant to *Alderman* v. *United States*, 394 U.S. 165. After a hearing, the district court ruled that the eavesdropping in no way contaminated the evidence and entered a new judgment of conviction. Petitioner appealed (Case No. 28934). On March 9, 1970, he moved for an order allowing him to file a petition for rehearing with respect to the earlier decision and to consolidate that case with the present appeal. He expressly stated that he did not challenge the rulings on the eavesdropping question. The court denied that motion, and it is from this ruling that petitioner seeks certiorari.

While the court of appeals justifiably declined to reconsider matters which it had previously decided, we do not contest the right of petitioner to defer raising those issues on petition for a writ of certiorari until after the judgment which had originally been vacated by the court of appeals was reinstated and affirmed by the court of appeals. While technically this petition is premature, since the court of appeals has not finally acted on the appeal from the reinstated judgment,[1] the court of appeals has made clear that it intends to rely on its former opinion. We therefore treat the merits of the issue raised.

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[1] Petitioner has asked the court to rule on his appeal from the reinstated judgment and the government has moved to dismiss that appeal as frivolous.

Before giving its instructions to the jury, the trial judge held a conference in his chambers, attended by attorneys for the government, petitioner and his counsel. The court expressed its opinion, based on the evidence, that the sole factual issue to be decided by the jury was whether petitioner was the one who had cashed the checks. Defense counsel agreed (Tr. 199).[2] He requested only three instructions, one relating to burden of proof, another concerning impeachment of witnesses, and a third bearing upon the failure of petitioner to take the stand. All parties agreed that there was only one issue—identity—and that this, together with the instructions requested by petitioner's counsel, would constitute the only charges to be given the jury (Tr. 202-206).

During his closing argument, counsel for the defense stressed that identity was the only issue he wished the jury to consider, announcing (Tr. 230):

> Our position simple [*sic*] is as simple as this, and do not let counsel mislead you: there is only one issue before you—was Mr. Urbana the individual that gave those two witnesses those checks. It is as simple as that; and if you find and believe, and you are convinced beyond a reasonable doubt, find him guilty. It is just that simple.

The court then charged the jury in the manner agreed to by defense counsel, adding only that the indictment had been previously read to the jury and

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[2] We are lodging with the Clerk of this Court a copy of the relevant portions of the transcript of trial, and an excerpt of the proceedings during empaneling of the jury.

that a copy would be with them in the jury room (Tr. 259). At the conclusion of his charge, the district judge asked defense counsel if he had any objections to the instructions as given. Counsel replied that he had none (Tr. 268).

The court of appeals correctly concluded that, in the circumstances of this case, the district court's instructions did not constitute plain error (412 F. 2d 1081 at 1083). *United States* v. *Bard*, 408 F. 2d 347 (C.A. 6), certiorari denied, 396 U.S. 855; *United States* v. *Schmidt*, 376 F. 2d 751 (C.A. 4), certiorari denied, 389 U.S. 884; *United States* v. *Salliey*, 360 F. 2d 699 (C.A. 4); *Herzog* v. *United States*, 235 F. 2d 664 (C.A. 9), certiorari denied, 352 U.S. 844. Not only did petitioner's counsel fail to raise any objection to the instructions, even though he was afforded full opportunity to do so, he gave his approval of the charge as presented. Fed. R. Crim. P. 30. The indictment had previously been read to the jury, was incorporated by reference in the instructions, and was with the jurors during their deliberation. The jury was thus aware of the other elements of the offense, which were uncomplicated and not disputed.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

JULY 1970.

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